(8)

No. 89-542

In the Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS

v.

DEPARTMENT OF DEFENSE, ET AL., RESPONDENTS

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF FOR THE NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, NINETEEN GOVERNORS IN THEIR CAPACITIES AS COMMANDERS IN CHIEF OF THEIR STATE NATIONAL GUARD, AND THE STATES OF ALABAMA, ALASKA, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WISCONSIN, AND WYOMING, AS AMICI CURIAE SUPPORTING RESPONDENTS *

STEPHEN M. SHAPIRO
MICHAEL K. KELLOGG
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0619

* A complete list of amici is found at pp. iii-iv of this brief.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

QUESTION PRESENTED

Whether the Militia Training Clause of the United States Constitution, art. I, § 8, cl. 16, requires the federal government to obtain the consent of the Governor before sending state National Guard units on peacetime training missions to foreign countries.

Amici Joining The National Guard Association of the United States

A. Governors in their capacities as Commanders in Chief of their state National Guard:

THE HONORABLE CECIL ANDRUS
Governor, State of Idaho

THE HONORABLE HENRY BELLMON
Governor, State of Oklahoma

THE HONORABLE TERRY E. BRANSTAD
Governor, State of Iowa

THE HONORABLE CARROLL A. CAMPBELL
Governor, State of South Carolina

THE HONORABLE GASTON CAPERTON
Governor, State of West Virginia

THE HONORABLE GARREY CARRUTHERS
Governor, State of New Mexico

THE HONORABLE MICHAEL N. CASTLES
Governor, State of Delaware

THE HONORABLE WILLIAM P. CLEMENTS, JR.
Governor, State of Texas

THE HONORABLE JOE FRANK HARRIS
Governor, State of Georgia

THE HONORABLE MICHAEL HAYDEN
Governor, State of Kansas

THE HONORABLE RAY MABUS
Governor, State of Mississippi

THE HONORABLE JAMES G. MARTIN
Governor, State of North Carolina

THE HONORABLE BOB MARTINEZ
Governor, State of Florida

THE HONORABLE BOB MILLER
Governor, State of Nevada

THE HONORABLE BUDDY ROEMER
Governor, State of Louisiana

THE HONORABLE WILLIAM DONALD SCHAEFER
Governor, State of Maryland

THE HONORABLE GEORGE A. SINNER
Governor, State of North Dakota

THE HONORABLE JAMES R. THOMPSON
Governor, State of Illinois

THE HONORABLE TOMMY G. THOMPSON
Governor, State of Wisconsin

B. States through their Attorneys General:

MICHAEL J. BOWERS
Attorney General, State of Georgia

ROBERT A. BUTTERWORTH
Attorney General, State of Florida

DOUGLAS B. BAILY
Attorney General, State of Alaska

CHARLES W. BURSON
Attorney General, State of Tennessee

J. JOSEPH CURRAN, JR.
Attorney General, State of Maryland

WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana

DONALD J. HANAWAY
Attorney General, State of Wisconsin

ROBERT H. HENRY
Attorney General, State of Oklahoma

JIM JONES
Attorney General, State of Idaho

BRIAN MCKAY
Attorney General, State of Nevada

T. TRAVIS MEDLOCK
Attorney General, State of South Carolina

JOSEPH B. MEYER
Attorney General, State of Wyoming

MIKE MOORE
Attorney General, State of Mississippi

CHARLES M. OBERLY, III
Attorney General, State of Delaware

LINLEY E. PEARSON
Attorney General, State of Indiana

DON SIEGELMAN
Attorney General, State of Alabama

ROBERT T. STEPHAN
Attorney General, State of Kansas

HAL STRATTON
Attorney General, State of New Mexico

ROBERT A. TELLINGHUISEN
Attorney General, State of South Dakota

MARY SUE TERRY
Attorney General, State of Virginia

LACY H. THORNBURG
Attorney General, State of North Carolina

R PAUL VAN DAM
Attorney General, State of Utah

WILLIAM L. WEBSTER
Attorney General, State of Missouri

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-542

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL., PETITIONERS

v.

DEPARTMENT OF DEFENSE, ET AL., RESPONDENTS

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF FOR THE NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, NINETEEN GOVERNORS IN THEIR CAPACITIES AS COMMANDERS IN CHIEF OF THEIR STATE NATIONAL GUARD, AND THE STATES OF ALABAMA, ALASKA, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WISCONSIN, AND WYOMING, AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICI

The National Guard Association of the United States (NGAUS) is a nonprofit organization composed of commissioned officers and warrant officers of the Army National Guard or Air National Guard of the various States who are simultaneously Reserve Officers with equivalent ranks in the Army or Air National Guard of the United States. Current membership in NGAUS is approximately 58,000. NGAUS is joined here by the

Governors of 19 States who, under the laws of their respective States, are the Commanders in Chief of their state National Guard when those units are not called into federal service. NGAUS is also joined by 23 States through their Attorneys General.

Because of their dual status, members of NGAUS owe a dual allegiance. They are military officers of their respective States, subject to the state Constitution and the orders of the state Governor. At the same time, they are military officers in the Army or Air Force Reserve, subject to the Constitution of the United States and the orders of the President. If the orders of a state Governor and the President do not conflict, this dual status raises no legal or practical difficulty. If, however, members of NGAUS receive conflicting orders from the President and their Governor, they are placed in an untenable situation.

To avoid such conflicts, the United States Constitution carefully delineates the respective spheres of state and federal control over the various state militias, of which the National Guard is the modern counterpart. The Militia Mobilization Clause, art. I, § 8, cl. 15, grants Congress the authority to call the militia into federal service "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Congress also has authority, under the Militia Training Clause, art. I, § 8, cl. 16, "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." To the States is reserved "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." This division of responsibility allows Congress to ensure that National Guard units from the various States can be readily combined into a highly and uniformly trained national force, equipped to meet any emergency that might arise. At the same time, the National Guard is available for service within the individual States and

constitutes a crucial, decentralized counterbalance to the dangers of a standing Army identified by the Framers of the Constitution.

This delicate balance between federal and state control over the militia has kept America strong and free for over 200 years. It is now threatened by both sides in this litigation. Governor Perpich is seeking to arrogate to himself a role in foreign affairs by means of a veto power over federal measures designed to ensure that the National Guard is capable of meeting the exigencies of modern warfare. The federal government, by contrast, is attempting to override the restrictions of the Militia Clauses by invoking its powers under the Army Clause, art. I, § 8, cl. 12, the very powers that the Framers sought to contain by means of a strong, well-disciplined militia.

Amici believe that the proper resolution of this case is to be found in the Militia Training Clause itself. Congress's authority to provide for "organizing, arming, and disciplining, the Militia" is broad enough to encompass orders for National Guard units to conduct peacetime training missions overseas and is a sufficient constitutional basis for sustaining the Montgomery Amendment. Indeed, given the realities of modern warfare and modern geopolitics, such training missions are essential to the development of a unified and effective fighting force. The authority of individual States to conduct the actual "training of the Militia, according to the discipline prescribed by Congress" does not give those States any authority to object to "the location, purpose, type, or schedule" of such training missions. See 10 U.S.C. § 672(f) (1989 Supp.). Thus, this case can and should be resolved without ever reaching the much broader Army Clause argument raised by the federal government. In that way, the unique hybrid status of the National Guard will be preserved, and the balance of power struck by the Framers will be maintained.

STATEMENT

A Short History of the Militia. By all accounts, the performance of the various state militias during our War of Independence was, at best, erratic. Indeed, the militia's lack of training and discipline in the art of war was a constant source of complaint by George Washington to the Continental Congress. See, *e.g.*, Letter from General Washington (Sept. 24, 1776), quoted in *The Militia*, S. Doc. No. 695, 64th Cong., 2d Sess. 23-24 (1917):

> To place any dependence upon militia is assuredly resting upon a broken staff. Men just dragged from the tender scenes of domestic life, unaccustomed to the din of arms, totally unacquainted with every kind of military skill (which being followed by want of confidence in themselves when opposed to troops regularly trained, disciplined, and appointed, superior in knowledge and superior in arms), makes them timid and ready to fly from their own shadows. Besides the sudden change in their manner of living (particularly in the lodging) brings on sickness in many, impatience in all, and such an unconquerable desire of returning to their respective homes that it not only produces shameful and scandalous desertions among themselves but infuses the like spirit in others. * * * To bring men to a proper degree of subordination is not the work of a day, a month, or even a year; and, unhappily for us and the cause we are engaged in, the little discipline I have been laboring to establish in the Army under my immediate command is in a manner done away by having such a mixture of troops as have been called together within these few months.

The role of the militia in the new republic was accordingly one of the most hotly debated topics at the Constitutional Convention (see pp. 15-18, *infra*). Most of the Framers wanted to be able to rely on the militia as an effective federal force in times of peril so as to eliminate the need for a large standing army. At the same time,

there was considerable anti-Federalist sentiment in favor of the States retaining plenary control over their respective militias. The Framers, as in so many areas, reached a delicate compromise between the power of the federal government and the autonomy of the States. They granted to Congress the authority to "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, cl. 15 (the Militia Mobilization Clause). And they specified that, on these occasions, Congress would "govern[] such Part of [the Militia] as may be employed in the Service of the United States." Furthermore, in order to ensure that each state militia was prepared to perform its national duties when called upon to do so, the Framers granted Congress authority to "provide for organizing, arming, and disciplining, the Militia," while reserving to the States "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Art. I, § 8, cl. 16 (the Militia Training Clause).

Congress, however, was slow to exercise its new power. Flushed with the triumph of the Revolution, and geographically remote from the squabbles of Europe, Congress contented itself with designating virtually every able-bodied man between 18 and 45 as a member of his state militia. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271. As far as "arming" the militia was concerned, Congress simply required "every citizen so enrolled" to "provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack * * * with a box therein to contain not less than twenty-four cartridges" (*ibid*). For "discipline," Congress specified that "the rules of discipline" adopted by the Continental Congress in 1779 for the Revolutionary Army "shall be the rules of discipline to be observed by the militia throughout the United States" (*id.* § 7 at 273). See 13 *Journals of the Continental Congress* 384 (Mar. 29, 1779), adopting Baron de Steuben's *Regulations for*

the Order and Discipline of the Troops of the United States (reprinted by Greenleaf's Press, New York 1794). And for "organization," Congress specified the division of the troops and the necessary officers and required brigade-inspectors to conduct inspections of the men while under arms, "superintend their exercise and manoeuvres, and introduce the system of military discipline before described" (Act of May 8, 1792, § 10 at 273).

Such was the militia of the United States, in times of war and in times of peace, for over a century. Not surprisingly, the militia performed well in times of peace, devoting itself to "showy parades in harlequin uniforms." *Federal Aid in Domestic Disturbances*, Sen. Doc. No. 263, 67th Cong., 2d Sess. 205 (1922). Equally unsurprising was the inadequate performance of the militia when called forth to federal service. Following a particularly poor showing in the Spanish-American War, due to inadequate and incompatible training of units, President Roosevelt declared that "[o]ur militia law is obsolete and worthless" and sought reforms. *Annual Message to Congress* (Dec. 3, 1901).[1]

In the Act of January 21, 1903, ch. 196, § 1, 32 Stat. 775, Congress established for the first time "the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia," with the remainder of able-bodied male citizens to be known as

[1] In a message to Congress, Secretary of War Elihu Root elaborated on the need for a new militia law:

> It is really absurd that a nation which maintains but a small Regular Army and depends upon unprofessional citizen soldiery for its defense should run along as we have done for one hundred and ten years under a militia law which never worked satisfactorily in the beginning, and which was perfectly obsolete before any man now fit for military duty was born. The result is that we have practically no militia system, notwithstanding the fact that the Constitution makes it the duty of the Federal Congress "to provide for organizing, arming, and disciplining the militia."

S. Rep. No. 2129, 57th Cong., 2d Sess. 1 (1902).

"the Reserve Militia." The Act provided financial grants to state National Guard units and specified that "[t]he organization, armament, and discipline of the organized militia * * * shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States." *Id.* § 3 at 775. The National Defense Act of 1916, ch. 134, 39 Stat. 166, further expanded federal financial support for Guard units, and also prescribed qualifications for National Guard officers, providing for their recognition by federal authorities only should they be found qualified.

In the years following World War I, the National Guard was reconstituted in more dramatic fashion to reflect the experience of that conflict. Because the structural organization of the Army differed from that of the National Guard, the government was unable to incorporate volunteer Guard units as units, but instead drafted Guard members individually. Upon demobilization, the Guard units had to be painstakingly reconstituted. This process not only hurt National Guard morale; it was also viewed as bad federal defense policy, given that trained units are generally in short supply at the beginning of a crisis. Accordingly, Congress passed the Act of June 15, 1933, ch. 87, 48 Stat. 153, "so as to eliminate the delay incident to draft," to keep Guard units intact, and "to preserve the traditional character of the Guard as that of volunteer rather than draftees." S. Rep. No. 135, 73d Cong., 1st Sess. 2 (1933).

The 1933 Act established the National Guard of the United States (NGUS) as a reserve component of the Army of the United States. Appointment as an officer in a State's National Guard carried with it a parallel appointment as an officer in NGUS; this so-called "dual enlistment" concept is still in place today. While maintaining the character of the National Guard as essentially a state organization in times of peace, the 1933

Act granted the President power to order the National Guard into federal service whenever "Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army" (§ 111 at 160). Guard members ordered into active federal service were relieved from duty in their state National Guard until demobilized, at which point they automatically resumed service in their Guard units (*ibid.*).

In 1952, Congress extended the circumstances in which the federal government could call Guard members into active service. In two provisions, now codified at 10 U.S.C. §§ 672(b) & (d), Congress provided that the Secretary of Defense or his designee could order any Guard unit into active duty "for not more than 15 days a year" with the consent of the Governor, and could retain persons on active duty for longer periods of time with the consent of both the individual and of his Governor. Since 1952, yearly orders to active duty for training purposes, usually for two weeks at a time, have been essential in preparing the Guard for its role as a reserve component of the United States armed forces, a role that is now vital to our ability to meet any military exigency.

In 1986, as part of the nation's Total Force military capability, 18 of the 28 total Army divisions available in the event of war were provided in whole or in part by the Army National Guard. Similarly, the Air National Guard provided 73 percent of the nation's air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of air rescue and recovery forces, 14 percent of special operations forces, and 24 percent of tactical air support forces. See J.A. 12-13 (Testimony of James H. Webb, Jr.).

Facts and Proceedings Below. National Guard troops are regularly sent for training to foreign countries.[2] They proceed under federal orders on "active duty for training," as authorized by 10 U.S.C. §§ 672(b) & (d), in order to come within the protections of the various "status of forces agreements" that the United States has with foreign nations and to ensure the availability of federal benefits if they are killed or injured. J.A. 21. But during training they remain within their state Guard units under the direct command of state-appointed officers. These officers conduct the actual training of their units under the general direction of the Army.

In 1985, National Guard units began conducting training missions in Honduras. Specifically, over a three year period, the Guard built a road connecting the Northern Yoro province, an agricultural center in the interior of the country, to the town of Olanchito, 50 kilometers away, with access from there to the seaport of Laceiba. These missions accordingly served the dual purposes of training the National Guard to perform a difficult engineering feat in the mountains and jungles of Central America while at the same time providing humanitarian aid to an important ally in a conflict-ridden region. Several Governors objected to this use of their National Guard and threatened to withhold their consent. Congress responded by passing the Montgomery Amendment, 10 U.S.C. § 672(f) (1989 Supp.), which states that "[t]he consent of a Governor [to a call to active duty for peacetime training] may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty."

---

[2] As of the end of 1986, more than 42,000 National Guard members had participated in overseas training and 69 exercises in 46 countries. J.A. 20 (Testimony of James H. Webb, Jr.).

Petitioner Rudy Perpich, the Governor of Minnesota and Commander in Chief of the Minnesota National Guard, filed suit seeking a permanent injunction against enforcement of the Montgomery Amendment. Governor Perpich also sought a declaratory judgment that the amendment violated the Militia Training Clause of the United States Constitution insofar as it infringed on the power reserved to the States to "train" their respective militias. The District Court granted summary judgment for respondents (Pet. App. 142-153), holding that "the Militia clause does not restrain Congress' authority [under the Army Clause] to train the National Guard while the Guard is in active federal service" (*id.* at 150).

A three-judge panel of the court of appeals reversed. The case was then reargued *en banc*, the panel opinion was vacated, and the judgment of the district court affirmed (Pet. App. 1-62). The full court, with two judges dissenting, held that, when Guard units are ordered into federal service for training, they are no longer in the militia; they are part of the Army. "The statutes authorizing this federal action," the court stated (*id.* at 10), "are statutes grounded upon the army clause." "Congress' army power is plenary and exclusive. The reservation to the States of authority to train the militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces." *Id.* at 13. Thus, the court held, "[t]he Montgomery Amendment is a constitutional exercise of Congress' army powers" which is "beyond the reach of the militia clause." *Id.* at 10, 13.

SUMMARY OF ARGUMENT

Petitioners' assertion (Br. 8-9) that the States have complete dominion over the peacetime training of the National Guard is belied by the language of the Militia Training Clause, art. 1, § 8, cl. 16. "[T]hat provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard)." *Gilligan* v. *Morgan*, 413 U.S. 1, 6 (1973). The States exercise their authority only through the power to appoint officers and to conduct the "training of the Militia *according to the discipline prescribed by Congress.*" Art. I, § 8, cl. 16 (emphasis added). It is clear from contemporary sources that the word "discipline" was used by the Framers to describe whatever training regimen Congress thought necessary to ensure that the militias of the various States could be readily combined into a highly and uniformly trained national force, equipped to meet any emergency that might arise.

Current political events and modern technology dictate that our Nation's first line of defense is no longer contiguous with its borders. If the National Guard is to fulfill its role as part of our Total Force military capability, it must be trained to respond rapidly to emergencies throughout the world. And that in turn requires that it be trained throughout the world. To argue, as petitioners do, that the "discipline" prescribed by Congress cannot reflect these modern realities is as foolish as to contend that the "arms" provided by Congress are limited by the Constitution to the musket or firelock of the Revolutionary War. The Executive Branch has determined that overseas training of the National Guard is "an operational necessity" (J.A. 13). It follows that the President, as part of his delegated authority to prescribe the discipline according to which the National Guard must be trained, has the power to mandate overseas training without fear of being countermanded by individual Governors.

The United States, however, is not content to rest upon its authority under the Militia Training Clause to send Guard units overseas. It is seeking to use the "dual enlistment" of members in both the National Guard and the Army or Air Force Reserve to assert untrammeled command and control over the Guard. But the Militia Clauses themselves contemplate a hybrid state/federal militia, with shared control of just the sort that now exists over the National Guard. And Congress established the dual enlistment system for the express purpose of implementing, not circumventing, the Militia Clauses. Thus, the hybrid nature of the National Guard does not create a backdoor through which the federal government can obtain units whenever it does not want to be bothered with the restrictions of the Militia Clauses. The United States is seeking nothing less than to read those restrictions out of the Constitution.

The Framers were not insensible to the necessity for federal control over the militia in times of military exigency. But they greatly feared any such aggregation of power in times of peace. Accordingly, they "decentralized" the military by giving to the States the power to appoint officers and conduct the peacetime training of the militia "according to the discipline prescribed by Congress." The militia of citizen soldiers, so constituted, is not a quaint relic of antiquity; it is an essential counterbalance to the standing Army of professional soldiers which the Framers uniformly feared. This case can and should be resolved under the Militia Training Clause itself without ever reaching the broader argument urged by the United States. In that way, the unique status of the National Guard will be preserved, and the balance between state and federal power struck by the Framers will be maintained.

ARGUMENT

THE MILITIA TRAINING CLAUSE GRANTS CONGRESS AUTHORITY TO SEND STATE NATIONAL GUARD UNITS OVERSEAS ON PEACETIME TRAINING MISSIONS WITHOUT OBTAINING THE CONSENT OF THEIR STATE GOVERNORS

This Court has already recognized that "[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution." *Maryland* v. *United States*, 381 U.S. 41, 46, vacated on other grounds, 382 U.S. 159 (1965). No one has ever disputed that essential point. Indeed, by federal statute the Army and Air National Guard are each defined as the land and air force, respectively, that "is trained and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution." 10 U.S.C. §§ 101 (10)(B) & 12(B). See also 32 U.S.C. §§ 101(4) & (6) (defining the National Guard as "the organized militia of the several States and Territories").[3]

Under the Militia Training Clause, therefore, the States have authority to train the National Guard "according to the discipline prescribed by Congress." The first question presented to the Court is whether "the discipline prescribed by Congress" may extend to prescribing the location of training. The issue, in other words, is whether the Militia Training Clause itself permits Congress to mandate overseas training of the National Guard without first obtaining the consent of state Governors. If, as we contend, it does, then the Montgomery Amendment is plainly constitutional under the Militia Training Clause, and the Court need never reach

[3] Nor is it disputed that the States have an absolute right to maintain such a militia, a right guaranteed not only by the Militia Clauses themselves, but reinforced by the Second Amendment to the Constitution. See *United States* v. *Miller*, 307 U.S. 174, 178 (1939) (the Second Amendment was added "[w]ith obvious purpose to assure the continuation and render possible the effectiveness" of the various state militias).

the much broader issue raised by the United States of whether Congress can exercise plenary control over the National Guard under the Army Clause, notwithstanding the limitations of the Militia Clauses.

A. The Language And History Of The Militia Training Clause Demonstrate That The Framers Intended To Give Congress Authority To Ensure The Uniform And Effective Training Of The Militia

Petitioners' assertion (Br. 8-9) that the States have complete dominion over the peacetime training of the National Guard is belied by the language of the Militia Training Clause. "[T]hat provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard)." *Gilligan* v. *Morgan*, 413 U.S. 1, 6 (1973). The States exercise their authority only through the power to appoint officers and to conduct the "training of the Militia according to the discipline prescribed by Congress." The States, in other words, are the "drill-sergeants;" but it is Congress that prescribes the drill. See 2 M. Farrand *Records of the Federal Convention of 1787* 385 (rev. ed. 1966) (speech by Elbridge Gerry).

The *Oxford English Dictionary* (1933) defines "discipline" in its military application as: "Training in the practice of arms and military evolutions; drill. Formerly, more widely: Training or skill in military affairs generally; military skill and experience; the art of war." [4]

[4] As examples of the broad and comprehensive meaning of the word "discipline," the OED cites Gibbon (1776): "It was the rigid attention of Aurelian, even to the minutest articles of discipline, which bestowed such uninterrupted success on his arms;" Lee (1775): "Without discipline armies are fit only for the contempt and slaughter of their enemies;" and Harris (1659): "School of war * * * where all the Martiall Spirits resorted, to learn Discipline, and to put it in practice." Dr. Johnson's *Dictionary of the English Language* (1755) gives as one definition simply "Military regulation," with a quotation from *Richard III*: "This opens all your victories in Scotland,/Your discipline in war, wisdom in peace."

It is in just this broad sense that the word "discipline" was used in Eighteenth Century America. For example, the Continental Congress adopted Baron de Steuben's *Regulations for the Order and Discipline of the Troops of the United States* because "Congress judg[ed] it of the greatest importance to prescribe some invariable rules for the order and discipline of the troops, especially for the purpose of introducing an uniformity in their formation and manoeuvres, and in the service of the camp." 13 *Journals of the Continental Congress* 385 (Mar. 29, 1779). And it was precisely to introduce such "uniformity" in training that the Framers of our Constitution granted Congress the power to prescribe the discipline of the militia.

There was a general tension at the Convention between the desire to form a strong and effective central government and the fear that such a central authority would overshadow the individual States and ultimately deprive the people of their newly won freedom. At no time during the Convention was that tension more palpable than in the attempt to give the federal government the military means to provide for the common defense, while retaining sufficient military forces under state control to oppose, by force of arms if necessary, any move towards tyranny.

The Framers ultimately settled upon the plan laid out by George Washington in his *Sentiments On a Peace Establishment* (1783), reprinted in H.R. Rep. No. 141, 73d Cong., 1st Sess. 23 (1933). General Washington called for a small standing army in times of peace to be supplemented by the various state militias in times of war and other national exigency. He stressed, however, that such a plan would only work if the federal government could ensure "[a] well organized militia," trained "upon a plan that will pervade all the States, and introduce similarity in their establishment, maneuvres, exercise, and arms." *Ibid.* Washington believed that such a grant of power over the peacetime training of the militia was essential to ensure an effective, na-

tional military force that would render a large standing army unnecessary. The alternative, as he knew from bitter experience, was to permit the States to neglect the training of the militia, a neglect that would result in a number of incompatible and ineffective units that could not readily be mobilized in defense of the country.

Despite General Washington's prestige, the issue was sharply contested at the Constitutional Convention in Philadelphia as well as at the ratifying conventions in the various States. The original plan of the Constitution contained only the Militia Mobilization Clause. See 2 Farrand at 330. George Mason proposed granting Congress the power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers." He urged that "uniformity [was] necessary in the regulation of the Militia, throughout the Union." *Ibid.* General Pinckney agreed that "[u]niformity was essential" and stressed that "[t]he States would never keep up a proper discipline of their militia." Oliver Ellsworth protested that such an amendment "went too far" in "submitting the militia to the General Government" and effectively took "[t]he whole authority over the Militia * * * away fro... the States whose consequence would pine away to nothing after such a sacrifice of power." *Id.* at 330-331. John Dickinson proposed, as a narrower alternative, "to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia." *Id.* at 331.

The question was submitted to a "Grand Committee" of eleven, who proposed the Militia Training Clause, largely in its current form. 2 Farrand at 356. Concerns were expressed by some delegates over the broad scope of Congress's authority to "discipline" the militia. Ellsworth remarked "that the term discipline was of vast extent and might be so expounded as to include all power on the subject." Rufus King attempted to re-

assure Ellsworth that by "disciplining" the committee meant only "prescribing the manual exercise evolutions &c." A number of delegates were not appeased, however. Elbridge Gerry protested that "[t]his power in the United States as explained is making the States drill-sergeants" and would "take the command from the States, and subject them to the General Legislature." *Id.* at 385. Ellsworth and Roger Sherman moved to replace the Militia Training Clause with narrower language, leaving out the word "discipline," that would "refer the plan for the Militia to the General Government, but leave the execution of it to the State Governments." *Id.* at 386. James Madison insisted on retaining the word "discipline":

> The primary object [of the clause] is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the Militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution.

Id. at 386-387 (emphasis in original). Edmund Randolph echoed these concerns and stressed that "[l]eaving the appointment of officers to the States protects the people against every apprehension that could produce murmur." *Id.* at 387. Ellsworth's motion was thereupon defeated by a vote of 10 States to one. *Ibid.*[5]

---

[5] At the various ratifying conventions, the Militia Training Clause was defended (and attacked) in similar terms. Patrick Henry, for example, called attention "to that part which gives the Congress power 'to provide for organizing, arming, and disciplining the militia, etc.' By this, sir, you see that their control over our

Alexander Hamilton made the clearest statement in defense of Congress's power to discipline the militia—and the clearest indication of the scope of that power—in *The Federalist Papers*, No. 29 at 182 (Rossiter ed. 1961):

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert—an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.[6]

last and best defense is unlimited." 3 J. Elliot *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 52 (1901). Madison, in response, reaffirmed the need for substantial federal authority over peacetime training: "the only possible way to provide against standing armies is to make them unnecessary. The way to do this is to organize and discipline our militia, so as to render them capable of defending the country against external invasions and internal insurrections." *Id.* at 413.

[6] Petitioners (Br. at 21) make much of Hamilton's statement that the States would retain "the preponderating influence" over the militia. See also Br. of Massachusetts, et al., at 26. But Hamilton made it perfectly clear that it was only "the circumstance of the officers being in the appointment of the States" that would secure to them such an influence; "the regulation of the militia," meanwhile, was confided "to the direction of the national authority." *The Federalist Papers*, No. 29 at 182, 186.

Petitioners also rely (Br. at 22 n.15) on Hamilton's assurance that the militia would not be sent on "distant and distressing expedition[s]." But Hamilton does not cite any want of constitutional authority for such expeditions; the check he foresees is solely a political one. Federal officials are not likely to "commence their career by wanton and disgustful acts of power, calculated to answer

The Militia Training Clause accordingly gave Congress the power to require that each of the state militias and the standing army be uniformly organized, armed and trained, so that in times of national danger they could be fitted together, like individual bricks in a fortress, to form an integrated defense of the union. As General Washington said, with evident relief, in 1795: "In my opinion Congress has the power, by the proper organization, disciplining, equipment, and development of the militia to make it a national force, capable of meeting every military exigency of the United States." Quoted in H.R. Rep. 297, 64th Cong. 1st Sess. 2 (1916).

B. Congress Has Delegated Its Authority Over The Peacetime Training Of The National Guard To The President

Congress has delegated to the President the power to "prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. § 110. Accordingly, the President has the authority to mandate whatever peacetime training he considers necessary to ensure that the National Guard will be a uniform and effective fighting force, readily integrated with the regular Army, and able to respond quickly to any emergency.

The United States apparently views this delegation of Congress's authority under the Militia Training Clause as irrelevant to the present case because, under the dual enlistment concept, the President can order Guard units to train in their capacity as reserve components of the United States armed forces. See Br. in Opp. at 7-8. Under this view, the President can order a Guard unit to "active duty for training" at any time and for any reason, and that unit is then wholly integrated into, and completely under the command and control of, the Army,

no end, but to draw upon themselves universal hatred and execration." *The Federalist Papers*, No. 29 at 187.

notwithstanding the carefully-crafted balance between state and federal power in the Militia Clauses.

Setting aside the question whether Congress would have the constitutional authority to establish such a regime, it does not appear to have been Congress's intent to do so. Current federal law in fact favors the alternative view that the President directs the training of the National Guard qua National Guard, without first mobilizing them as part of the regular Army. The Constitution draws a fundamental distinction between the peacetime training of the National Guard under Clause 16 and its mobilization in times of national crisis under Clause 15, and federal law is properly read to follow that distinction. Indeed, Congress itself has stipulated that the Army and Air National Guard are "trained * * * under the sixteenth clause of section 8, article I, of the Constitution." 10 U.S.C. §§ 101(10)(B) & 12(B).

As already noted (see pp. 7-8, *supra*), the primary purpose of the "dual enlistment" concept was to permit National Guard units to be mobilized intact in times of emergency. The peacetime training of the National Guard continues as before, with one exception. The President was given the peacetime authority temporarily to place Guard units on "active duty for training" status as part of the Army or Air Force reserve. See 10 U.S.C. §§ 672(b) & (d). Putting Guard members in federal status for training serves two purposes: it brings Guard members within the protections of the various "status of forces agreements" that the United States has with foreign nations; and it ensures the availability of federal benefits if they are killed or injured. J.A. 21 (testimony of James H. Webb, Jr.). But it does not take the National Guard wholly outside the strictures of the Militia Training Clause.[7]

[7] When called to active duty for training, Guard members are technically relieved from duty in their state units. 32 U.S.C. § 325. Accordingly, no conflict arises between federal orders directing the

On these training missions, Guard members are still under the direct operational command of officers appointed by the States under the Militia Training Clause, and it is those state-appointed officers who play the role of "drill-sergeants." Individual Guard units may be, and usually are, fitted into a broader federal structure and thereby subjected as units to federal direction, but within units the actual training is conducted by state-appointed officers. Such overall federal coordination, coupled with the line authority of state-appointed officers, strikes precisely the balance required by the Militia Training Clause. Accordingly, this "quasi-federalization" of the Guard, for purposes of peacetime training, is both contemplated and permitted by the Militia Training Clause. It need not call into play Congress's general powers under the Army Clause.

C. The President Has Determined That The Realities Of Modern Warfare Require The National Guard To Train Throughout The World

Petitioners and their amici themselves acknowledge that the word "discipline" in the Militia Training Clause refers to the "substance or content" of training (Pet. Br. at 46). See *id.* at 9 ("uniform training exercises"); *id.* at 10 ("training regimen"); *id.* at 18 ("standards for training"); Br. of Massachusetts, et al., at 50 ("performance of field exercises and drills"). They nonetheless contend that Congress's authority (and, hence, by delegation, the authority of the President) to prescribe such discipline is "narrow" because the field exercises and drills of the Continental Army consisted only of

training of the Guard and possible state orders putting the Guard to some other use. But this administrative transfer for purposes of directing a training exercise does not work a wholesale absorption of the Guard members into the federal military. Indeed, Congress expressly disclaimed any intent to "federalize" the National Guard beyond the minimum required to ensure uniform and effective training. S. Rep. No. 1795, 82d Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. & Admin. News 2005, 2015.

"'the manual exercise evolutions &c'" (*id.* at 50 (quoting 2 Farrand at 385)).

But the word discipline cannot be read to freeze in place the training of a bygone age. As Hamilton remarked, with his usual prescience: "What plan for the regulation of the militia may be pursued by the national government is impossible to be foreseen." *The Federalist Papers*, No. 29 at 184. To argue that the "discipline" prescribed by Congress cannot reflect the realities of modern warfare is as foolish as to contend that the "arms" provided by Congress are limited by the Constitution to the musket or firelock of the Revolutionary War.

This Court has recognized that the Militia Training Clause gives Congress "authority to prescribe and regulate the training and weaponry of the National Guard" and that implicit in that authority is the need to "make comparative judgments on the merits as to *evolving* methods of training, equipping and controlling" the Guard. *Gilligan* v. *Morgan*, 413 U.S. at 8 (emphasis added). As the art of war changes, so too must the discipline and weaponry prescribed by Congress. And the art of war has changed fundamentally since 1787. Marching and presenting arms on the Cambridge Common are no longer sufficient training.

Even the antiquated training regimen of Baron de Steuben stipulated (at 20) that "[t]he captain must exercise his company in different sorts of ground." See also *The Federalist Papers*, No. 56 at 348 (Madison) (noting that although "[t]he art of war teaches general principles of organization, movement, and discipline, which apply universally," in prescribing discipline for the militia Congress must take into account "[t]he general face of the country, whether mountainous or level, most fit for the operations of infantry or cavalry"). If that was true at a time when the art of war consisted of little more than marching and firing in line, it is certainly true today when the Guard may be called upon in times of exigency to respond with sophisticated weapons to crises throughout the world.

Current political events and modern technology dictate that our Nation's first line of defense is no longer contiguous with its borders. If the National Guard is to fulfill its role as part of our Total Force military capability, it must be trained to respond rapidly to emergencies throughout the world. And that in turn requires that it be trained throughout the world. The modern weapons with which Congress has armed the Guard—for example, high altitude supersonic fighters, jet transports, M-1 main battle tanks, laser-guided and optically-guided anti-tank missiles—are all sensitive to the climatic and geographical environment in which they are maintained and operated. Unless Guardsmen are trained to use those weapons in climatic and geographical conditions outside the United States, they will not be able to respond effectively in times of emergency. "The added realism of training outside the United States, in terrain, climate, transportation and use of equipment, differences in operating procedures, and language, provides the best environment that tests every member of a unit and enhances readiness." J.A. 20 (testimony of James H. Webb, Jr.).

Even petitioners acknowledge (Br. at 46) that "training on the basis of terrain or climate" is part of the "substance or content" of training that the President may prescribe. It must follow that, in order to assure uniform training, the President may choose the location of training and that state Governors have no authority to veto that choice. Guardsmen must train wherever the regular Army trains so that they can "discharge the duties of the camp and of the field with mutual intelligence and concert." *The Federalist Papers*, No. 29 at 182 (Hamilton). As then Assistant Secretary of Defense Webb explained to Congress (J.A. 13):

> We have increasingly staked our national security on the ability to mobilize, deploy, and employ combat ready National Guard and Reserve members and units anywhere in the world rapidly. Consequently, effective and realistic training throughout the world is a necessity if we are to rely on the men and women of the National Guard to perform their federal mobilization missions within current deployment schedules. Adequate training for National Guard members who have become more directly involved in our defense posture under the Total Force Policy is an operational necessity and also an obligation, owed to those guardsmen who will be committed to the battlefield, to enhance their proficiency and ability to fight and survive.

Under these circumstances—where the Executive Branch has determined that overseas training of the National Guard is "an operational necessity"—it defies rational analysis to contend that the President, as part of his delegated authority to prescribe the discipline according to which the National Guard must be trained, has no power to mandate overseas training, but must go hat in hand to the nation's Governors to request that such training be conducted. The Montgomery Amendment simply prescribes a necessary zone of flexibility for the President so that he can devise an effective training regimen for the Guard.

D. The Court Should Decide This Case Under The Militia Training Clause In Order To Preserve The Delicate Balance Between State And Federal Authority Over The Militia

Our current Total Force policy largely follows the lines laid out by George Washington over 200 years ago in his *Sentiments On A Peace Establishment*. We have today a small, all-volunteer standing Army supplemented by highly and uniformly trained National Guard units prepared to respond quickly and effectively to any emergency. The training, the weapons, and the geopolitical

realities have all undergone fundamental changes since the early days of our Republic; but the constitutional balance between state and federal authority over the militia has been preserved. Both sides in this litigation seek to alter that balance.

The attempt of Governor Perpich to hamstring federal efforts to ensure a uniformly trained, effective militia is easily parried. Just as the realities of modern economic life have led the federal government to exercise a greater and more intrusive role in traditional state affairs under the Commerce Clause, so too the realities of modern warfare and modern politics have led Congress to exercise a greater and more intrusive role in the training of the National Guard. In both cases, the language of our Constitution is not so rigid as to preclude this increase in federal authority.

But if our constitutional division of power between the States and the federal government is to have any meaning, there must be limits beyond which federal encroachments may not extend. The United States is unnecessarily using this case to test those limits. The United States is seeking to exercise untrammeled command and control over the National Guard at all times and in all circumstances by the simple expedient of invoking the Army Clause. The United States, in short, wants to read the Militia Clauses out of the Constitution (or, at least, read the National Guard—contrary to Congress's express intent—out of the Militia Clauses).

Apparently, the United States is primarily concerned not with the Militia Training Clause, which governs this case, but with the Militia Mobilization Clause, which provides that the militia may be called forth "to execute the Laws of the Union, suppress Insurrections, and repel Invasions." The United States fears that "[i]f the National Guard of the United States were subject to these limitations, this would call into question the constitutional authority of the President to use these forces

in the defense of the interests of the United States outside our territorial boundaries." See Opposition to Motion of Amicus Curiae NGAUS for Leave to Participate in Oral Argument at 2. This concern is unfounded.

Clause 15 does not impose any inflexible limitation on the authority of the President to use the National Guard in defense of U.S. interests overseas. This Court has previously declared that the circumstances listed in Clause 15 are examples of "exigenc[ies]" suitable for calling forth the militia, not rigidly restrictive categories. See *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 28 (1827). Given the international scope of our peacetime commitments, the President's authority to deploy military force throughout the world must be a broad one. And whenever American troops take the field to meet a military exigency—be it in the jungles of Vietnam, on the beaches of Grenada, over the skies of Libya, or in the streets of Panama City—the President may mobilize National Guard units as needed.[8]

In any event, even if the Militia Mobilization Clause did impose a limitation on the range of military circumstances in which Congress could call forth the National Guard, Congress could clearly overcome that limitation by invoking its War Powers.[9] In the *Selective Draft*

---

[8] This Court has held that the President has exclusive authority, pursuant to congressional delegation, to decide whether "the exigency [contemplated by Clause 15] has arisen;" his decision is binding on all other persons and cannot be challenged in court. *Martin* v. *Mott*, 25 U.S. at 28.

[9] Invocation of the War Powers does not require a formal declaration of war under art. I, § 8, cl. 11. It may be premised on action like the Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), in which Congress stated that it "approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." See *Johnson* v. *Powell*, 414 F.2d 1060 (5th Cir. 1969); *Drifka* v. *Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).

Law Cases, 245 U.S. 366, 375 (1918), the Court held that *in times of armed conflict* the federal government can directly raise and deploy any and all military forces without regard to the Militia Mobilization Clause. That holding is clearly correct, for as Madison recognized, the federal government's authority must certainly be "most extensive in times of war and danger." *The Federalist Papers*, No. 45 at 293.

But the United States cannot properly invoke the *Selective Draft Law Cases* in this case, which involves peacetime training, not wartime mobilization. The Framers carefully distinguished between the two because, although they wanted the protection of a central Army in times of national crisis, they feared it in times of peace. Accordingly, they "decentralized" the military by giving to the States the power to appoint officers and to conduct the peacetime training of the Militia "according to the discipline prescribed by Congress." The militia of citizen soldiers, so constituted, is not a quaint relic of antiquity; it is an essential counterbalance to the standing Army of professional soldiers which the Framers uniformly feared, however necessary they thought it to be. See *The Federalist Papers*, No. 46 at 299 (Madison) (noting that the Militia will outnumber the standing army and thus can be counted upon to repel any danger).[10]

The reading of the Militia Training Clause that we propose strikes the very balance sought by the Framers

---

[10] An undue aggregation of power in the federal military may seem implausible today. But no one can forsee what upheavals, economic and otherwise, may lie in store for this Nation which would set the stage for such an occurrence. See Eisenhower, *Farewell Address* (Jan. 17, 1961) ("We must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.") In any event, the Framers chose not to rely wholly on the forbearance and good offices of the Army, but erected a structural safeguard instead.

between overbroad federal control and undisciplined state control over the militia. The Militia Training Clause contemplates a hybrid state/federal militia, with shared control of just the sort that now exists over the National Guard. Thus, the hybrid nature of the National Guard cannot remove it altogether from the restrictions of the Militia Training Clause whenever the federal government waves its "active duty" wand. On the other hand, the Militia Training Clause cannot be read to preclude the federal government from ensuring the combat readiness of the National Guard by prescribing a regime of discipline that includes overseas training. The President's delegated responsibility for the discipline of the National Guard plainly gives him the authority to determine the "location, purpose, type [and] schedule" of training without obtaining the consent of the various state Governors. 10 U.S.C. § 672(f) (1989 Supp.).

We accordingly urge the Court to reject the Government's invitation to decide this case on unnecessarily broad grounds. The Court need look no further than the Militia Training Clause itself to find a sufficient constitutional basis for the Montgomery Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEPHEN M. SHAPIRO
MICHAEL K. KELLOGG
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0619
Counsel for Amici Curiae

MARCH 1990